FILED
DEC 1 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 516

EUNICE E. EASTMAN,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, and GEORGE WHITNEY, as a member of the firm of J. P. Morgan & Co.,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH M. CARSON,
Counsel for Respondents.

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OPINIONS BELOW

The opinion of the District Court (R. 129-44) appears in 43 F. Supp. 637. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 152-7) is reported in 130 F. (2d) 300.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Judicial Code § 240-A, as amended by the Act of February 13, 1925.

STATEMENT

The petitioner is the sole remaining plaintiff, the complaint having been previously dismissed as against all the other plaintiffs on jurisdictional grounds. 117 F. (2d) 95, cert. den. 313 U. S. 559.

The complaint as amended charged that plaintiff Eastman was wrongfully induced by defendants to exchange $10,000 principal amount of 6% notes issued by Van Sweringen Corporation under an offer made on October 29, 1931 (R. 3-9).

After service of their answer respondents answered extensive requests for admissions and written interrogatories propounded by plaintiff (R. 127) and took her deposition upon oral examination (R. 51). They then moved for summary judgment (R. 14). Plaintiff made a cross-motion for summary judgment relying solely upon respondents' moving papers and the record in the case (R. 50) thus conceding that no issue of fact was involved. The District Court granted respondents' motion and judgment was entered dismissing the complaint on the merits (R. 144-5). The Court of Appeals unanimously affirmed.

The claims asserted by the plaintiff and the facts surrounding the making of the exchange offer are summarized in the opinions below (R. 129-44, 152-7), and need not be restated.

The frequently misleading use which petitioner makes of the record is best dealt with by reviewing her contentions on the merits, which review will show the absence of any question justifying certiorari.

QUESTIONS PRESENTED

The questions of law presented on the undisputed evidence in the record relative to the exchange offer of October 29, 1931 are:

1. Whether the defendants committed fraud on the plaintiff Eastman.

2. Whether there was a breach of trust subjecting the defendants to liability.

ARGUMENT

POINT I

THE ESSENTIAL ELEMENTS OF AN ACTION FOR MISREPRESENTATION ARE COMPLETELY LACKING.

The five essential requirements of a fraud action are representation, falsity, scienter, deception and injury. *Ochs* v. *Woods*, 221 N. Y. 335, 338. Plaintiff herself disclaimed the first of these on her deposition and failed to raise any issue of fact as to the other four.

1. No Misrepresentation by Defendants.

The printed form of exchange offer dated October 29, 1931, and signed by Van Sweringen Corporation was sent to plaintiff by her brokers, Lee Higginson & Co., from whom she originally purchased the notes at 77½ in February 1931, and who recommended acceptance of the offer (R. 52-3, 70-3). Plaintiff admitted that no letters were received from Guaranty Trust Company, J. P. Morgan & Co. or Guaranty Company in connection with the offer, and that she did not discuss it orally with anyone connected with those companies (R. 56). This fact is corroborated by defendants' own affidavits (R. 15, 47).

2. Falsity, Scienter, Deception and Injury Not Proved.

There was likewise no falsity. No claim was made in the amended complaint or by plaintiff in her deposition that the offer itself contained any misrepresentations. Although it was claimed in the complaint (R. 7-8) that the noteholders including plaintiff were deceived by the balance sheet of Van Sweringen Corporation and its subsidiary

Cleveland Terminals Building Corporation, dated September 30, 1931, plaintiff adduced no proof that any of the figures or data contained therein were false or incorrect. It is undisputed that this balance sheet was received by plaintiff either from Van Sweringen Corporation or from Lee Higginson & Co. and not from defendants (R. 53).

Even if we assume that the offer was in reality that of defendants, as plaintiff's counsel suggests (br. pp. 36-7), and that defendants were responsible for the drafting of the balance sheet, they still would not be liable for fraud. Plaintiff did not pretend to have been deceived by any of the statements appearing in the offer itself. There was no proof of any deception as to the value of the common stock of Van Sweringen Corporation received by plaintiff under the offer. There were no statements as to the stock except such as appeared in the balance sheet (R. 62-9), and plaintiff was clearly not deceived by the form of the balance sheet. She testified on her deposition that she and her father, who was the owner of a printing business, had looked over the balance sheet (R. 52-3, 55, 59). Anyone examining the same would necessarily have realized that the stock of Van Sweringen Corporation at that particular time had little, if any, market value.[1]

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[1]Statements made by plaintiff's counsel to the effect that the defendants in their moving papers admit that an analysis of the balance sheet showed that the stock was worthless in October 1931 (br., p. 32) and that they knew it was worthless at that time, are not true. Although from their examination of the balance sheet they realized that its market value at the time of the offer was little or nothing, it could not be said that the stock was worthless because if there were a general economic recovery, which everyone was anticipating at that time, or an improvement in the Cleveland real estate situation, the stock would in all probability have reflected such recovery and increased in value accord-

The balance sheet showed that the only assets of Van Sweringen Corporation besides cash on deposit of less than $2,000 and the remaining segregated assets and assigned securities valued at about $13,444,000, were an investment in the entire capital stock of Cleveland Terminals Building Company and an open account for advances made to that company of over $27,000,000. Although the balance sheet listed the stock of Cleveland Terminals Building Company at approximately $29,250,000, it was there stated that this represented its cost at date of acquisition "without giving effect to adjustment in market value of listed securities owned" by Cleveland Terminals Building Company. Reference was then made to the attached balance sheet of Cleveland Terminals Building Company which set forth that the listed stocks which it owned, all of which were stated as having been pledged as collateral, had shrunk in value from approximately $38,000,000 in September 1930 to approximately $8,260,000 in September 1931. The cost of these securities was listed at about $37,232,000 in the Cleveland Terminals Building Company balance sheet. As the District Court pointed out in its opinion (R. 134), the difference between cost and market, *i.e.* about $29,000,000, practically wiped out Van Sweringen Corporation's investment

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ingly. In the light of subsequent events, the stock did prove worthless, but it was impossible to estimate in October 1931 what its true value might be in the event of such a recovery. As the District Court said (R. 142):

> "What the stock was then worth was problematical. Both sides now admit that it was worthless, but who could then tell? In judging their acts, we must look at the facts as they existed at the time, not aided or enlightened by those which subsequently took place. *Purdy* v. *Lynch*, 145 N. Y. 462. A wisdom developed after an event is a standard no man should be adjudged by. *Costello* v. *Costello*, 209 N. Y. 252-262."

in the stock of its subsidiary, shown as one of the principal assets on the balance sheet.

The balance sheet further showed that Van Sweringen Corporation had a total deficit on September 30, 1931, of over $2,120,000 and a loss for the first nine months of 1931 of nearly $1,300,000. In fact plaintiff testified that she must have seen this deficit when she looked over the balance sheet (R. 55). It also showed that Cleveland Terminals Building Company had sustained a net loss of over $1,600,000 for that same period.

The doubtful value of the open account of Cleveland Terminals Building Company was further demonstrated by its balance sheet which showed that nearly all of its assets, outside of securities, consisted of investments in Cleveland real estate, which plaintiff assumed was depressed at that time (R. 57). Moreover, among the liabilities of Cleveland Terminals Building Company listed on the balance sheet was nearly $24,000,000 principal amount of various mortgage bonds issued by it, $4,000,000 of which Van Sweringen Corporation had contingently guaranteed.

As a matter of fact, plaintiff did not rely upon the balance sheet at all in determining whether or not to accept the offer of Van Sweringen Corporation. In reaching that decision she really relied upon the judgment and advice of her father, who was a man of some business standing in the community (R. 56), and who, from his study of the balance sheet, would have seen that the stock offered to the noteholders in addition to the cash had little if any value at that time.

Plaintiff also failed to prove that she suffered any injury as the result of the offer. She received 50 cents on the dollar for the notes which had been selling in the market

for approximately 30 shortly prior to the offer (R. 25, 43). She also received 3 cents on the dollar as interest. Her own counsel admits (br. pp. 27-8) that the segregated assets and assigned securities were insufficient to the extent of $453,000 to pay 50 cents on the dollar to each noteholder and interest. No effort was made by plaintiff to prove how she would have fared if the offer had not been made, or that she would have realized more than 53 cents on the dollar if default had occurred in November 1931 and legal proceedings had been instituted to collect the open account owed by Cleveland Terminals Building Company to Van Sweringen Corporation. Speculation cannot be substituted for actual proof of injury.

Not one of the five elements necessary for recovery in an action for misrepresentation exists here. Plaintiff did not even attempt to raise an issue of fact in this respect.

POINT II

THERE WAS NO BREACH OF TRUST.

The District Court followed the admonition of Rule 8(f) of the Rules of Civil Procedure that a pleading should be "construed as to do substantial justice", and afforded plaintiff every possible benefit on the motions for summary judgment by construing the complaint as "alleging rather inartistically not only misrepresentation but possibly a breach of trust" (R. 132).

1. There Was No Trust or Fiduciary Relationship Between Defendants and Plaintiff.

Obviously, no fiduciary or trust relationship existed between plaintiff and J. P. Morgan & Co. It did not partici-

pate in the original issue of the notes. It had no dealings with plaintiff or the other noteholders.

There was likewise no trust or fiduciary relationship between Guaranty Trust Company and the plaintiff or any of the other noteholders. Although Guaranty Trust Company was named as "trustee" in the so-called trust indenture (R. 75-105) under which the notes were issued, there was no real trust because there was no trust *res*. In order to have a valid trust there must be a trust *res*.

> *Bradford* v. *Chase National Bank,* 24 F. Supp. 28, aff'd 105 F. (2d) 1101, aff'd 309 U. S. 632;
> Scott—*The Law of Trusts,* § 2.6.

See to the same effect:

> *Bank of America* v. *Scully,* 92 F. (2d) 97 (C. C. A. 10);
> *Collins* v. *Mosher,* 91 F. (2d) 582 (C. C. A. 9);
> *American Surety Company* v. *Baldwin,* 90 F. (2d) 708 (C. C. A. 7);
> *In re United Cigar Stores Co.,* 70 F. (2d) 313, 315 (C. C. A. 2);
> *Hickok* v. *Bunting,* 67 A. D. (N. Y.) 560, 562;
> *City Bank Farmers Trust Co.* v. *Charity Organization Society,* 238 A. D. 720; aff'd 264 N. Y. 441.

The trust indenture dated May 1, 1930 between Van Sweringen Corporation and Guaranty Trust Company (R. 75-105) made no provision for the holding of any property by Guaranty Trust Company for the benefit of the note-

holders. It is clear from a reading of the indenture that there was no trust *res*.

The notes themselves specifically refer the noteholders to the indenture "for a description of the terms on which such notes are issued and of the rights of the Trustee and of the holders of the notes under said Indenture" (R. 76-7). Neither the notes nor the indenture state that the notes are secured by anything.

The indenture provided that contemporaneously with the issue of the notes the Van Sweringen Corporation would acquire, free from any lien or encumbrance, 500,000 shares of Alleghany Corporation, to be known as "segregated assets" (R. 83-4). The indenture further provided (R. 85) that whenever the aggregate value of the segregated assets should exceed 50% of the aggregate principal amount of the notes then outstanding, the corporation could use such excess for its general corporate purposes. The parties were explicit in providing that the segregated assets should not constitute collateral security or a pledge for the payment of the notes (R. 84).

Likewise, the so-called "assigned securities" were not to be held in trust. The agreement of May 1, 1930 (R. 105-11) relating to these securities, provided that whenever the value of the segregated assets should be less than 50% of the principal amount of the outstanding notes, the Messrs. Van Sweringen would repair such deficiency by assigning and delivering to Van Sweringen Corporation readily marketable securities in the amount of such deficiency (R. 106-7). In consideration of the assignment and delivery of the marketable securities under this agreement Van Sweringen Corporation was required to deliver to the

Messrs. Van Sweringen stock or obligations of the corporation (R. 107).

The assigned securities belonged to Van Sweringen Corporation after their assignment and delivery from the Messrs. Van Sweringen. These securities were "available to the creditors of the Corporation for application to the payment of its debts and liabilities" (R. 86, 107-8). Moreover, the corporation could dispose of them to provide funds necessary for the payment of indebtedness when it did not have cash available for that purpose (R. 88, 109). They were not to be held in trust for the noteholders by the corporation. Only the notes or obligations given to the Messrs. Van Sweringen by the corporation in consideration of the assignment and delivery of these securities were to be held in trust for the noteholders and then only in the event of liquidation and a deficiency in the payment of the $30,000,000 note issue (R. 86, 107). This is the so-called "property in trust" referred to in plaintiff's brief (p. 18).

The agreement of May 1, 1930 (R. 105-11) relating to the assigned securities clearly did not constitute a trust *res* as plaintiff's counsel suggests (br. p. 23). It was not held by Guaranty Trust Company for the benefit of the noteholders. Guaranty Trust Company was not under any duty to institute any proceedings for the enforcement of its provisions unless requested to do so in writing and upon being indemnified to its satisfaction. It was "under no duty" to the noteholders in the absence of such request and indemnity (R. 110-11).

Guaranty Trust Company did not have title to or possession of the segregated assets or assigned securities. It never held them for the benefit of the noteholders. At all

times they were owned by and kept in the possession of Van Sweringen Corporation (R. 30). In fact no property of any kind was ever held by Guaranty Trust Company in trust or for the benefit of the noteholders.

The rights and powers given to Guaranty Trust Company under the so-called trust indenture and the duties imposed upon it by the indenture did not create any fiduciary relationship in the absence of a trust *res*. The duties were routine in nature and for the most part discretionary. For example, Guaranty Trust Company had to authenticate the notes issued under the indenture (R. 80), receive and pay the interest and principal of the notes at its principal office in New York City (R. 76), and receive information, financial statements and balance sheets of the corporation with respect to which it had no duty or obligation whatsoever (R. 89-90). It could declare the principal due in the event of any default and had certain other discretionary powers. But it was not bound to institute legal proceedings unless the holders of at least 25% of the principal amount of the outstanding notes requested it to do so, and furnished it with satisfactory indemnity (R. 92-3, 98). If Guaranty Trust Company then refused to proceed within a reasonable time the noteholders were empowered to institute proceedings (R. 96-7), so that plaintiff's statement (br. pp. 21-2) that Section 24 of the indenture vested Guaranty Trust Company with the exclusive right of action is inaccurate.

The courts below did not overlook the fundamental law of trusts as charged by plaintiff's counsel (br. pp. 20-3). They properly followed the authorities previously cited in holding that there could be no trust relationship in the absence of a *res*.

In *Farmers Loan & Trust Co.* v. *Lake Street R. R. Co.*, 173 Ill. 439, 51 N. E. 55, relied upon by plaintiff (br. p. 22), there was an actual trust *res*, the obligor of the bonds involved having given a mortgage and trust deed to the trustee. This is likewise true in *Straus* v. *Chicago Title & Trust Co.*, 273 Ill. App. 63, also cited by plaintiff (br. p. 23). Moreover, plaintiff's summary (br. p. 21) of Professor Scott's statement in § 2.2 of his *The Law of Trusts* is quite inaccurate.

Since no fiduciary relationship existed as between Guaranty Trust Company and the plaintiff or any of the other noteholders, there could be no breach of trust by defendants.

2. The Defendants Neither Received Any Part of the Segregated Assets or Assigned Securities Nor Benefited by the Offer.

The disposition of the segregated assets and assigned securities is set forth in detail in Mr. Whitney's affidavit (R. 30-3). It is there definitely shown that the defendants received no part of these securities or the proceeds thereof. These facts were not contradicted by plaintiff on the motion for summary judgment and stand undisputed. The affidavits also completely disprove the charge made by plaintiff's counsel in the complaint that defendants appropriated all other available assets of Van Sweringen Corporation and its subsidiary Cleveland Terminals Building Company (R. 29-33).

Plaintiff's counsel states again and again in his brief that by means of the offer defendants were able to substitute $13,784,000 of the notes in place of worthless stock of Van Sweringen Corporation as collateral for the bank

loans. This is a most misleading statement. When $15,000,000 principal amount of the notes was retired under the offer the defendants and the other banks participating in the loan to Vaness Company could have insisted that the remaining assigned securities totaling approximately $7,514,000 be pledged for the loan (R. 27). This right was recognized in the agreement of October 29, 1931 (R. 122-3). The bankers (including not only the defendants but seven other banks and bankers, R. 19) in consenting to the making of the offer relinquished their right to this collateral and in return Vaness Company agreed to give the notes acquired by it under the offer to the bankers as collateral for its loan (R. 123).

Although the bankers also agreed to and did release stock of Van Sweringen Corporation needed for the offer, the notes were not received by them in place of said stock but in place of the assigned securities, as the agreement of October 29, 1931 clearly shows (R. 123).

The bankers thus released their right to over $7,500,000 of the assigned securities, consisting of United States Government obligations and cash, so that the offer could be made to all noteholders, assuring them 50 cents on the dollar plus interest, in return for $13,784,000 of the Van Sweringen notes which shortly before the making of the offer had been selling on the market for about 30 cents on the dollar.

Moreover, the bankers did not use these notes as a means of collecting the open account of approximately $27,000,000 owed by Cleveland Terminals Building Company to Van Sweringen Corporation and took no advantage of their position in this regard even after Van Sweringen Corporation defaulted in the payment of interest

after November 1932. They merely held the notes as part of the collateral securing the loans until September 1935 when the collateral was sold at public auction (R. 35). Prior to the auction, after a careful study by the banking group, it was decided that the value of the notes was so problematical and in any case so small that no protective bid would be put in for the notes at the auction, and the banking group did not bid for them (R. 46). The collateral underlying not only the Vaness loan but the Cleveland Terminals Building Company loan was sold at the auction for $4,703,000 and the bankers realized only about 12 cents on the dollar (R. 35).

Since the defendants received no part of the segregated assets and assigned securities and did not benefit by the offer in any way, the cases cited by plaintiff's counsel at pages 37-40 of his brief, relating to fraud and breach of trust, have no application, even if we assume some fraud or breach of trust was practiced on plaintiff.

3. Assuming the Existence of a Fiduciary Relationship Between Guaranty Trust Company and the Noteholders, There Was No Violation of Duty.

The circumstances which induced the making of the offer to noteholders are set forth in detail in the affidavits (R. 15-49). The moving consideration for making the offer, in so far as defendants were concerned, was to stop the private purchase of notes by Van Sweringen Corporation with the segregated assets, even though such purchase was permissible under the terms of the indenture (R. 24, 38, 84-5). If these purchases continued, the result would be to reduce the outstanding notes to $15,000,000 and release the segregated assets and assigned securities from the

terms of the indenture (R. 24-5, 38-9). The Van Sweringens would then have free disposal of these assets subject, of course, to the rights of the New York banking group to require the deposit of the assigned securities as additional collateral for the bank loans (R. 27, 43, 49). This would leave the remaining half of the note issue without the protection of these securities.

The situation became even more alarming when, as the market value of the notes declined, Van Sweringen Corporation after the middle of September 1931 was able to buy notes at less than 50 cents on the dollar. In October the notes went down as low as the 30's (R. 43, 48). The result of these purchases at less than 50 was to make the securities available to the Van Sweringen interests in amounts greater than the purchase price (R. 25). In fact, nearly $4,000,000 of notes had been purchased at an average price of less than 50 cents on the dollar by the Van Sweringens before the making of the offer (R. 30).

It was realized that the banking group could throw Vaness Company and Cleveland Terminals Building Company into bankruptcy by calling the bank loans unless interest were paid on November 1, 1931, which because of the financial condition of the borrowers seemed unlikely (R. 39). If the banks were able in this way to force the subsidiary and also the parent of Van Sweringen Corporation into bankruptcy, Van Sweringen Corporation itself would probably have gone into bankruptcy, either voluntarily or involuntarily by action taken by Guaranty Trust Company on behalf of the creditor noteholders. Its only asset outside of the segregated assets and assigned securities, stockholdings in Cleveland Terminals Building Company and the open account indebtedness owed by the latter,

was less than $2,000 in cash (R. 64). Even if, as plaintiff claims, its only creditors were the noteholders, and even if we disregard its conditional liability as guarantor of an $8,000,000 note issue of Cleveland Terminals Building Company until one-half thereof had been paid (R. 64), which in all probability would have matured in the event of the latter's bankruptcy, the segregated assets and assigned securities would have been diluted to a great extent by the fees and expenses incident to a bankruptcy proceeding (R. 41-2). In this connection it should be recalled that at the time of the offer the segregated assets and assigned securities admittedly (pltf.'s br., pp. 27-8) were insufficient to pay every outstanding noteholder 50 cents on the dollar plus the November 1 interest. Moreover, there was the possibility which was considered by the defendants that a bankruptcy trustee might utilize a portion of these securities in an attempt to salvage the real estate holdings of Cleveland Terminals Building Company for the possible benefit of Van Sweringen Corporation creditors (R. 42).

We have already demonstrated the doubtful value of the $27,000,000 open account of Cleveland Terminals Building Company (pp. 5-6). Most of its assets consisted of mortgaged real estate holdings (R. 40, 66-7). Because of the condition of Cleveland real estate it would have been futile to try to realize on the equities of these holdings at that time (R. 26). All of its securities were pledged (R. 66). Among the liabilities listed on its balance sheet of September 30, 1931 were nearly $24,000,000 principal amount of various mortgage bonds issued by it (R. 67). Its balance sheet showed a net loss of over $1,600,000 for the first nine months of 1931 (R. 69). Moreover, the New York banks which made the large loan to Cleveland Termi-

nals Building Company in October 1930 (even if we eliminate entirely Guaranty Trust Company's participation therein), would have had a claim for any deficiency resulting after a forced sale of the collateral. Such a claim would have been on a parity with that of Van Sweringen Corporation for the $27,000,000 open account in any bankruptcy proceeding involving Cleveland Terminals Building Company (R. 42).

After the fullest consideration the defendants could only come to the conclusion that the alternative of possible insolvency proceedings offered no real prospect of the noteholders getting 50 cents on the dollar (R. 26, 43, 49). Furthermore, they could not hope for any immediate recovery in a bankruptcy proceeding. The best solution, from the standpoint of the noteholders, for the problem brought about by the decline in market values and particularly by the private purchase of the notes by the Van Sweringen interests, was to persuade Van Sweringen Corporation to pay the noteholders 50 cents on the dollar plus interest to November 1. Every noteholder would thereby be definitely assured of sharing equally and immediately in the segregated assets and assigned securities.

The common stock of Van Sweringen Corporation was also included in the offer at the suggestion of the Van Sweringens. Defendants believed this only fair to the noteholders so that they might have some interest in the equity of the corporation, whatever it might be, in the event security values and particularly Cleveland real estate should improve from the effects of the depression (R. 26-7, 44).

If defendants had really wished to harm the noteholders for their own personal gain, they could have done so merely

by lending the Van Sweringen Corporation the necessary funds to make the November 1 interest payment, if such funds could not have been obtained by other means, and by permitting and even encouraging Van Sweringen Corporation to continue the purchase of notes with the segregated assets. When $15,000,000 of the notes had been retired, defendants could then have insisted that the balance of the assigned securities be delivered to them as additional collateral (R. 27, 48-9). But, as has been said, they waived their rights in this respect so that all noteholders would be treated equally and could share alike in these securities.

By reason of the offer the noteholders were able to get 53 cents on the dollar in November 1931 for their notes which had been selling in the 30's just before the making of the offer, while the bankers, who are accused of having served their own interests in sponsoring the offer, realized only about 12 cents on the dollar on their loans after the collateral was sold in September 1935.

4. Plaintiff Suffered No Loss by Reason of the Exchange.

The Circuit Court was correct in holding that even assuming a fiduciary relationship, there was no proof of injury to plaintiff by reason of defendants' acts. As previously pointed out, the segregated assets and assigned securities in themselves were not sufficient to pay each noteholder 50 cents on the dollar plus the November 1, 1931 interest. The only other available asset of Van Sweringen Corporation was the open account indebtedness owed to it by its subsidiary Cleveland Terminals Building Company. This account was practically if not entirely worthless. Although the defendants' affidavits and the exhibits thereto annexed clearly demonstrated that in all probability plaintiff would not have realized 53 cents on the dollar

had the offer not been made, plaintiff offered no proof of any kind to the contrary, and even based her own motion for summary judgment on these same affidavits and exhibits. Plaintiff's counsel misrepresents the Circuit Court's opinion in stating that it concluded that the open account indebtedness of Cleveland Terminals Building Company was "of doubtful value" (br. pp. 25-6). The court after using the words "doubtful open account" immediately said (130 F. [2d] at 303):

> "A glance at the balance sheet of that company shows that even this debt was practically, if not entirely, worthless. . . ."

The decision of the Circuit Court of Appeals is not in conflict with the decisions in *McElwain* v. *Wickwire Spencer Steel Co.*, 126 F. (2d) 210, and *Miller* v. *Miller*, 122 F. (2d) 209, as contended in plaintiff's brief (pp. 10, 25). In both of these cases the proof adduced by the respective parties showed a substantial dispute of fact. In the present case, as we have already shown, no issue of fact exists. There must be a genuine issue as to a material fact in order to justify a denial of a defendant's motion for summary judgment. *Banco de Espana* v. *Federal Reserve Bank*, 28 F. Supp. 958, 973, aff'd in 114 F. (2d) 438.

POINT III

THE CIRCUIT COURT OF APPEALS PROPERLY DENIED PLAINTIFF'S MOTION TO HAVE THE RECORD AMENDED SO AS TO INCLUDE SENATE REPORT NO. 714, PART 3.

The report is a highly partisan and biased treatment of hearsay material and does not meet the requirements of Rule 56(e) relating to motions for summary judgment.

Moreover plaintiff's counsel made no application to have the District Court consider the material contained therein, as shown in the affidavit of defendants in the Circuit Court, which plaintiff has not included in the record now before this Court. Plaintiff did not request that she be given an opportunity to furnish any of the material set forth in the report in the form required by Rule 56(e). She did not apply for reargument on the basis of the report. No application was ever made to enlarge the record so as to include this report before the record was filed in the Circuit Court. In fact, plaintiff's application to that court to consider the report on her appeal was not made until defendants, as respondents, had already served and filed their brief.

The reports which this Court considered in *Arizona* v. *California,* 283 U. S. 423, involving the Boulder Dam project, and *Tempel* v. *United States,* 248 U. S. 121, involving the improvement of the Chicago River, present no parallel to the present situation. Clearly the ruling of lower courts on the admission of evidence is not a ground of certiorari.

CONCLUSION

This case does not present questions of any particular gravity or general importance. The legal questions raised are quite elementary. The decision of the Circuit Court of Appeals, which petitioner desires to have reviewed, is in full accord with the decisions of this Court, and does not conflict with decisions made by Circuit Courts of Appeals in the other circuits. Moreover, there has been no misin-

terpretation of the Federal statutes or the Rules of Civil Procedure.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 28, 1942.